U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 0 9 2013 Office: NEBRASKA SERVICE CENTER FILE

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Nitsio for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director). The appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner indicated that it is a high-end heating elements sales business. It seeks to employ the beneficiary permanently in the United States as a marketing manager. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which has been approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the petitioner had failed to establish that the beneficiary is qualified to perform the duties of the proffered position with a minimum of a bachelor's degree in business administration and 60 months (five years) of qualifying employment experience. The director denied the petition accordingly.

On motion, the AAO finds that the petitioner states new facts; therefore, the motion to reopen will be granted.

As set forth in the director's January 8, 2013 denial, the issue in this case is whether the petitioner has established that the beneficiary possessed all the education, training, and experience as of the priority date as required by the labor certification.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is March 14, 2012, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).[1] The Immigrant Petition for Alien Worker (Form I-140) was filed on June 29, 2012.

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[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also*, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

A review of the AAO's decision reveals that the AAO accurately set forth the basis for its dismissal of the appeal. The AAO determined that the petitioner had failed to establish that the beneficiary possessed the minimum level of education as stated on the labor certification and as required by the advanced degree professional visa category, and that there was insufficient evidence in the record to show that the beneficiary's work experience should be considered in establishing that he has the required education. The AAO thereafter dismissed the appeal.

On motion the issue is whether the petitioner has established that the beneficiary possesses all the education, training, and experience requirements indicated on the labor certification, with a minimum of a bachelor's degree in business administration plus five years of qualifying employment experience as required by the labor certification.

As noted above, the DOL certified the ETA Form 9089 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien labor certification is to examine the certified job offer *exactly* as

it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien labor certification must involve reading and applying *the plain language* of the alien labor certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien labor certification.

According to the plain terms of the labor certification in the instant matter, the applicant must have at a minimum a bachelor's degree in business administration, and five years of experience in the job offered as a marketing manager. The petitioner also indicated that it would accept a foreign educational equivalent.

Counsel asserts that USCIS should accept substitution of work experience for education and that as equivalencies are permitted for purposes of attainment of a Master's degree – a bachelor's degree plus five years of progressive work experience – then the beneficiary's work experience equivalencies should be accepted as fulfilling the petitioner's labor certification education requirement.

As noted by the AAO in its decision dated June 24, 2013, the labor certification in the instant matter states that the beneficiary possesses a bachelor's degree in business administration from the completed in 1981. However, the record of proceeding contains a copy of the beneficiary's and transcripts with translation from the and a copy of the beneficiary's certificate in Practical Management awarded by the in 1987. In addition, the petitioner submitted credential evaluations from dated February 11, 2004 and from for the dated November 15, 2012 in which the declarants assert that the beneficiary's years of professional experience are equivalent, at a minimum, to a four-year bachelor's degree in business administration from a regionally accredited college or university in the United States. also stated that the beneficiary's is equivalent to graduation from a vocational high school in the United States.

Although the declarants equated three years of experience for one year of education in the instant matter, that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The petitioner's actual minimum requirement on the labor certification was for the beneficiary to have a bachelor's degree in business administration and 60 months of progressive work experience. In response to question H.7 the petitioner indicated that no alternative field of study would be acceptable; to question H.8 the petitioner indicated that no alternate combination of education and experience was acceptable; and to question H.10 the petitioner indicated that experience in an alternate occupation would not be acceptable. It is noted that the petitioner signed the labor certification under penalty of perjury, and that no amendments to the labor certification were made prior to or after the DOL certification. There is

no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Immigration and Nationality Act (the Act) as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). Further, in order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single source degree that is the "foreign equivalent degree" to a United States baccalaureate degree plus five years of progressive work experience. 8 C.F.R. § 204.5(k)(2).

Counsel and the declarants infer that the regulations allow for an applicant to have the equivalent of a U.S. bachelor's degree, and that the regulations also allow a beneficiary to combine progressive work experience in the field with university study, and to use work experience only to meet the equivalency requirement. They further infer that three years of work experience in the field will be considered the equivalent of one year of U.S. university study; and that the beneficiary's credentials and work experience demonstrates that he has more than five years of related work experience in a related field. The evaluators assert that based on the fact that three years of progressive work experience in the field will be considered the equivalent of one year of U.S. university study, the beneficiary's years of progressive work experience should be considered the equivalent of four years of U.S. university study. Therefore, counsel and the declarants conclude that the evidence demonstrates that the beneficiary's education combined with his work experience is the equivalent of a four-year U.S. degree. Contrary to counsel's assertions, the evidence must show that the beneficiary has obtained a single U.S. bachelor's degree or foreign equivalent, which the petitioner has failed to establish.

When the beneficiary relies on a bachelor's degree (and five years of progressive experience) for qualification as an advanced degree professional, the degree must be a single U.S. bachelor's (or foreign equivalent) degree. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the legacy INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990) and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a

> bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold at least a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[2] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" of a United States baccalaureate degree. *See* 8 C.F.R. § 204.5(k)(2).

The beneficiary's degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that a beneficiary is an advanced degree professional is any less than the evidence required to show that the beneficiary is a professional. To do so, would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30706 (July 5, 1991).[3]

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[2] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of H-1B nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

[3] *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning

In addition, a three-year bachelor's degree will generally not be considered to be the "foreign equivalent" of a United States baccalaureate degree. *See Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977).[4] *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree); *see also Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich., August 20, 2010) (the beneficiary's three-year bachelor's degree was not the foreign equivalent of a U.S. bachelor's degree).

As is noted in the AAO's decision dated June 24, 2013, the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[5] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[6]

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relating to the area of exceptional ability").

[4] In *Matter of Shah* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

[5] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[6] In *Confluence International, Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the beneficiary's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the beneficiary's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification required a degree and did not allow for the combination of education and experience.

The AAO determined that based upon the opinion of AACRAO EDGE, the beneficiary's education, the represents attainment of a level of education comparable to completion of a vocational or other specialized high school curriculum in the United States. EDGE also discusses the EDGE advises that the is "awarded after one year of study at a and represents a level of education comparable to one year of university study in the United States." Therefore, based on the conclusions of EDGE, the director concluded that the beneficiary did not possess the required U.S. bachelor's degree in business administration or foreign equivalent degree as required by the terms of the labor certification and for classification as an advanced degree professional.

Therefore, based upon a review of the evidence, assertions made on motion, and the conclusions of EDGE, the AAO finds that the evidence in the record is not sufficient to establish that the beneficiary possesses a U.S. bachelor's degree in business administration or the foreign equivalent of a U.S. bachelor's degree.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is June 29, 2012. *See Matter of Wing's Tea House*, 16 I&N at 158.

Accordingly, it has not been established that the beneficiary has the requisite education as required by the ETA Form 9089 or that he is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)).

Beyond the decision of the director,[7] the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[8] If the petitioner's net income

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[7] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[8] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant*

or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the proffered wage is $144,060.80 and the priority date is March 14, 2012. The petitioner submitted a copy of the beneficiary's earnings statements for the pay periods July 1, 2012 to July 31, 2012; from August 1, 2012 to August 31, 2012; and from September 1, 2012 to September 30, 2012. The petitioner infers that it has only to establish its ability to pay the proffered wage from the priority date of March 14, 2012, and that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date in 2012. USCIS will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. The record of proceeding does not contain sufficient evidence to show that the beneficiary was paid the prorated wage from March 14, 2012 to December 31, 2012; as the record does not contain pay stubs from March 14, 2012 through June 2012 and from October 2012 through December 31, 2012. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted evidence to establish that the beneficiary's year-to-date wages paid as noted above were paid solely for work performed since the priority date.

The petitioner submitted its financial statements for 2012, as of March 31, 2012. The petitioner also submitted a letter from and business consultants firm in which the representative stated that the firm had compiled the accompanying balance sheets for the petitioner as of March 31, 2012. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are thus not persuasive evidence of the petitioner's ability to pay. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Corp. v. Sava, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd,* No. 10-1517 (6th Cir. filed Nov. 10, 2011).

Accordingly, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Beyond the decision of the director, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner also has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

The ETA Form 9089 specifically asks in Section C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner checked "no" to the question of whether the beneficiary was related to the owner. In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004). It appears from the evidence contained in the record of proceeding that the petitioner and the beneficiary may be in a familial relationship in that the beneficiary signed as the sole incorporator of the petitioning company with the dated August 12, 2009. It is also noted that the petitioner submitted copies of cancelled checks dated July 26, 2012, August 27, 2012, and September 27, 2012 that were made payable to the beneficiary and that were signed by the beneficiary as the company's representative. The beneficiary and the petitioner indicated that the beneficiary was employed as the company's marketing manager, thus calling into question the relationship that the beneficiary has with the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The inconsistencies could preclude the existence of a valid employment relationship. Accordingly, if the appeal were not being dismissed for reasons set forth herein, this would call into question the bona fides of the job offer. The petitioner must address this issue in any further proceedings.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reopen is granted and the decision of the AAO dated June 24, 2013 is affirmed. The petition is denied.